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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S OPENING BRIEF

MAXWELL KEITH,
111 Sutter Street,
San Francisco 4, California,
Attorney for Petitioner.

PEIRCE-PHELPS PRINTING CO., SAN FRANCISCO

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I

OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 311 F.2d 764 and appears at R. 564-573.

The opinion of the District Court in entering summary judgment against the petitioner is reported at 1961 Trade Cases, § 69,936 and appears at R. 347-360.

The opinion of the District Court in denying petitioner's application for an injunction upon the original complaint, subsequently amended, is reported at 162 F.Supp. 746 and appears at R. 42-44.

II

JUDGMENTS BELOW AND JURISDICTION

This was an antitrust action which was filed in the Northern District of California, Southern Division.

The District Court entered a judgment against petitioner in summary judgment (R. 360-361). Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment on January 2, 1963 (R. 574). This Honorable Court granted petitioner's petition for a Writ of Certiorari on April 29, 1963 (R. 575).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

III

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2; Section 4 of the Clayton Act, 15 U.S.C., Sec. 15; Section 16 of the Clayton Act, 15 U.S.C., Sec. 26. These are printed and attached hereto as Appendix A. Federal Rules of Civil Procedure, Rule 56, is also attached hereto as Appendix B.

IV

QUESTIONS PRESENTED

1. Whether an ousted independent service station dealer has a cause of action against his lessor and supplier under Section 4 of the Clayton Act for damages resulting from its refusal to renew a one year lease because of the dealer's disobedience to price control orders made by the lessor and supplier pursuant to its scheme and plan to fix and control the retail price of gasoline as to 3,000 dealers located in 8 western states by means of a so-called "retail dealer consignment agreement" plan?

2. Whether an independent service station dealer whose gasoline prices were fixed by his lessor and supplier has a cause of action under Section 4 of the Clayton Act against it for damages resulting from the service station dealer's coerced adherence to the supplier's price fixing directions?

3. Whether major gasoline suppliers are liable under the antitrust laws for using a one year lease as a weapon to restrain the independent dealers' ability to sell at prices in accordance with their own judgment to those injured by the weapon or whether the federal courts are allowed to immunize them from liability on the ground of the assumed dealers' consent to be victims of such weapon?

4. Whether petitioner was erroneously deprived of a trial by jury in the light of this Court's decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Poller v. Columbia Broadcasting System, Inc.*,

368 U.S. 464 (1962); *Continental Ore Corporation v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)?

5. Is not respondent's consignment method of fixing prices of gasoline sold by some 3,000 retail dealers, as enforced and policed by respondent, a per se violation of Sections 1 and 2 of the Sherman Act?

6. Is not respondent's consignment method of fixing resale prices of gasoline in violation of the Sherman Act because it fixes retail prices of dealers after the risks of title have passed to them?

V

STATEMENT OF THE CASE

A. Nature of the Case.

1. The Pleadings.

Petitioner alleged in his amended complaint (R. 46-59)[1] that the Union Oil Company of California (hereinafter referred to as Union) was in violation of the Sections 1 and 2 of the Sherman Act (R. 50) and pursuant to such violation injured the petitioner. Petitioner alleged that the respondent violated the prohibitions of the Sherman Act in promulgating and enforcing a "Retail Dealer Consignment Agreement" which allows respondent to directly fix the retail prices that thousands of otherwise independent service station operators can charge the public (R. 51). It was further alleged that respondent violated the

[1] An original complaint for injunctive relief was filed, R. 3-13, under 15 U.S.C. § 26. It sought an injunction to require Union not to lease the service station involved to anyone but the petitioner.

Sherman Act in requiring lessees of its stations to purchase all their gasoline and oil products from Union (R. 51, 52).

It was alleged that the "Retail Dealer Consignment Agreement" was forced on independent service station lessees. Existing lessees were forced to sign said retail dealer consignment agreements on fear of losing their leases (R. 51). New independent lessees were unable to obtain leases from Union without submitting to the signing of the consignment agreement (R. 51).

It was alleged that Union had established a policing system to make certain that the dealers were following the prices set by Union (R. 52). It was alleged that Union issued only one year leases and refused to renew leases for additional periods unless the lessee has complied with the requirements and conditions established by Union (R. 51, 52). It was further alleged that Union limited the ability of the lessees to operate profitably, and preventing lessees from obtaining goodwill or the fair market values of their business should they desire to sell the business (R. 52). The complaint alleged that Union controls the ability of independent lessees to operate profitably by freely selling its gasoline to companies who operate large "off-brand" stations. These companies set prices well below the prices established by Union, which was known to Union, but Union prevented the dealers from meeting this competition (R. 52-53).

The complaint detailed the facts with respect to petitioner's injury (R. 54-57). Petitioner obtained a one-year lease from respondent in May, 1956 (erratum).

He was required to sign the retail dealer consignment agreement in order to obtain the lease. (This agreement is printed at R. 95-102. The leases of petitioner are printed at R. 19-27; 28-36). The complaint specifically alleged the conditioning of the retail dealer consignment agreement to the lease at R. 55:

> "21. As a condition to the above leases defendant Union Oil Company required that plaintiff sign the said Retail Dealer Consignment Agreement, attached hereto as Exhibit 'A.' Plaintiff protested the signing of said agreement, but was informed, in effect, that he could not obtain a lease without signing said consignment agreement."

A second lease was signed in April, 1957 (R. 55).

In March, 1958, the three competitive service stations close to petitioner's, Standard, Tidewater-Associated, and Richfield, lowered their prices of regular gasoline from 34.9¢ to 27.9¢ (R. 55). In order to meet this competition, it was alleged, plaintiff after requesting authorization from respondent which was refused, lowered his price to 27.9¢. The consignment price for regular gasoline had been set by Union at 29.9¢ (R. 56). It was alleged that approximately a week later the Fresno Division Sales Manager came to petitioner's service station and ordered him to raise his price up to 29.9¢ (R. 56). The complaint alleged that he ". . . informed plaintiff that he would do everything in his power to cause plaintiff to conform to said prices. He implied by words and action that plaintiff's lease would not be renewed unless he raised

his prices to 29.9¢" (R. 56). Plaintiff refused to abide by the commands of the Union agent and persisted in setting his own retail prices (R. 56). On or about April 21, 1958, plaintiff was notified that the one-year lease would not be renewed (R. 56).

The complaint seeks monetary damages for loss of petitioner's business in the sum of $150,000.00, and for losses suffered by reason of the fixing of his prices while a lessee from May, 1956 to March, 1958, in the sum of $1,000.00 (R. 57).

On May 21, 1958, the day before his lease was to expire, the petitioner filed an action for injunctive relief seeking to compel Union not to lease the property to anyone other than plaintiff (R. 13). A temporary restraining order was granted (R. 547), but on June 3, 1958, the Court terminated the order and declined to issue a preliminary injunction (R. 42-44). The petitioner voluntarily vacated the service station site as of June 5, 1958 (R. 57). An order was entered upon stipulation, dismissing the original complaint and allowing the filing of an amended complaint (R. 44-45). The amended complaint was thereafter filed on July 3, 1958.

Before answer, the respondent made a motion to dismiss the amended complaint and for summary judgment (R. 59-61). The motion was denied without prejudice (R. 87-88). An answer was thereafter filed (R. 88-106).

The answer admitted that Union was a corporation doing business in the States of California, Arizona,

Oregon, Washington, Montana, Utah, Idaho, Nevada, Alaska and in the territory of Hawaii (R. 89); that it has assets in excess of three hundred million dollars and that it drills for, produces and imports crude oil (Id). It admits that it operates petroleum pipelines in the States of California and Montana and that it leases ships designed to transport crude oil and products along the seacoast of the West Coast of the United States. Union Oil admitted that it operates at least four refineries in the United States, one at Wilmington, California, one at Cutbank, Montana, one at Edmonds, Washington, and one at Oleum, California (R. 89-90). Union admitted that it is a wholesale distributor of petroleum products and owns or operates 400 bulk plant stations in the States of California, Arizona, Oregon, Washington, Montana, Utah, Idaho, and Nevada (R. 90). It sells products to wholesalers and retailers located in said states (R. 90). It owns and operates a number of gasoline transports in the eight western states which pick up petroleum products at transport terminals and deliver the petroleum products of defendant to retail outlets (R. 90).

The answer further admitted that it acquired possessory interests in service station sites in eight western states and leases such service station sites to others and "admits that most of said service station sites are leased or subleased by defendant to independent operators." (R. 91).

With respect to the "Retail Dealer Consignment Agreement" the answer refused to admit that it directly controlled retail prices, but it did attach a copy

of the agreement between petitioner and respondent to the answer (R. 91, 95-102).

With respect to the allegations concerning the petitioner's attempt to meet prices, establish his own market prices, and his consequent ouster, the respondent admitted that the authorized price to petitioner was 29.9¢ between February 28, 1958, and March 12, 1958 (R. 92). It admitted that petitioner sold regular gasoline at 27.9¢ (R. 92-93). It denied that petitioner had requested authorization to meet the price of 27.9¢ (R. 93). It admitted, however, that petitioner was ordered to follow Union's price. The answer stated, R. 93:

> "17. Answering paragraph 24, defendant admits that approximately one week later, Mr. W. S. Christopher, Division Sales Manager, Fresno, called on plaintiff and told him that he was violating the consignment agreement and informed plaintiff that he would do what he could to cause plaintiff to abide by the terms of the consignment agreement. Except as so admitted, defendant denies the averments of said paragraph 24."

The answer then admitted that petitioner persisted in setting his own prices at variance with respondent's authorized prices, and that thereafter the lease was not renewed (R. 93).

> "18. Answering paragraph 25, defendant alleges that following said conversation plaintiff refused to comply with his obligations under the consignment agreement existing between the parties and persisted in selling defendant's gasoline at prices at variance with those authorized by defendant

thereunder; admits that on or about April 21, 1958, plaintiff was notified that his lease would not be renewed by defendant. Except as so admitted, defendant denies the averments of said paragraph 25."

The answer asserted the affirmative defense of a prior judgment of the Superior Court of the State of California in and for the County of Fresno which was claimed to have adjudicated respondent's right to possession of the service station after May 22, 1958 (R. 94). It also asserted the affirmative defense of pari delicto (R. 94).

2. Pretrial Proceedings.

The District Court ruled that petitioner's discovery should be allowed only after pretrial conferences were requested by the plaintiff (R. 106-108). Thereafter, petitioner, in compliance with this order, filed a motion for a pretrial conference, a statement of issues and agenda and a statement re damages (R. 179, 187-188-189, 190-198). Respondent filed its statement of issues (R. 181-187).

This first pretrial conference was held April 30, 1959 (R. 368-392). At this pretrial conference the District Court was of the view that the parties could stipulate to the basic facts and utilize the interlocutory appeal provisions of the federal rules in order to determine the lawfulness of the respondent's retail dealer consignment agreement program (R. 373, 377-378, 386, 389). The conference ended with the request of the court that basic facts should be stipulated and

that there be a certification of the issues based on the stipulated facts as to violation of the antitrust laws (R. 391). The stipulations and contentions of Union Oil at the pretrial conference were that it tied the retail dealer consignment agreement to the granting of the one year lease (R. 380, 387)[2] and that it had the right to refuse to renew leases of those who refused to abide by its authorized prices (R. 386-388).[3]

A second pretrial conference was held May 21, 1959 (R. 392-406). At this pretrial conference the parties were unable to agree to stipulations as to undisputed facts. The District Court, upon the contentions of respondent's counsel, that respondent could lawfully, under the Sherman Act, grant only one year leases and then refuse to renew the leases of all those who did not abide by authorized prices, was of the view that respondent was willing to concede the basic issues in the case (R. 395-396, 399). It was of the view that petitioner should file a pretrial statement for a pretrial ruling on the issue of violation of the antitrust laws (R. 399-400, 403-406).

Thereafter, counsel for petitioner filed a pretrial statement for a pretrial ruling (R. 199-210). Attached to this statement were letters sent by respondent's General Sales Manager, Dealer Sales, to the division officers explaining or giving instructions on the retail dealer consignment program (R. 210-298). The

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[2]Attached hereto as Appendix C are certain quotations from the pretrial proceedings before the Court. See Part II, pp. vii-ix. They are examined more specifically in section 3, below.

[3]Id.

plaintiff's pretrial statement did not waive trial by jury (R. 199).

The respondent was to move for a pretrial ruling on this statement, but it did not do so (R. 399, 406). Instead it noticed the deposition of the petitioner. Portions of the depositions appear in the printed record at R. 452-493; 300-321.

Following the deposition of petitioner, respondent again moved for summary judgment (R. 298). The motion was on all issues (Id.). At the arguments on motion (R. 407-435) heard on February 11, 1960, the District Court was again of the opinion that, based on the extensive stipulations of counsel for respondent, issues could be and should be decided by the Appellate Courts (R. 413, 426-427, 435). The Court was of the view that petitioner should file a motion for partial summary judgment on the issue of violation of the antitrust laws (R. 427). The respondent stipulated that the purpose of the retail dealer consignment agreement program, among other things, was to control prices; that it would issue one year leases and not renew leases to those who did not agree to be consignees; that no free choice was allowed the dealer; he either accepted the package deal or he would not obtain a lease (R. 409, 415-419, 429).[4]

Subsequent to the motion of defendant for summary judgment, petitioner then filed a motion for partial summary judgment on the issue of violation of the antitrust laws (R. 337-338). The motion expressly

[4]See Appendix C herein, Part II; pp. ix-x.

did not waive petitioner's right to trial by jury (R. 338). An extensive memorandum in support of the motion for partial summary judgment was filed by petitioner, and its table of contents appears at R. 339-343. Following the argument on the petitioner's motion (see R. 436-441), the District Court ruled in favor of the respondent on all issues and filed an opinion (R. 347-360). Judgment was then entered for respondent (R. 360-361). Petitioner entered objections to the entry of judgment (R. 361-366).

3. The Stipulations and Undisputed Facts in Summary Judgment As To Violations of the Antitrust Laws.

The record thus contains stipulations by respondent, admissions contained in policy letters or in papers filed by respondent as to the purposes, means used, and effect of its retail dealer consignment agreement scheme. Respondent agreed that it would not dispute the policy letters it submitted to petitioner during these pretrial proceedings (R. 427-428).

(a) Interstate Trade and Commerce:

In addition to the admissions contained in the respondent's answer, the record contains basic admissions as to operation of respondent's consignment agreement program in interstate trade and commerce:

1. The Union Oil Company holds primary possession to 2,003 service stations in the States of California, Washington, Oregon, Nevada, Arizona, Montana, Utah and Idaho. (Statement of Defendant Pursuant to Proceedings of January 20, 1960 (R. 332-337).)

2. The Union Oil Company has gasoline supply agreements with an additional 2,116 dealers who either own the outlets or lease them from third parties (id.).

3. The gallonage delivered to the lessee dealers in 1957 was approximately 427,000,000 gallons, and to non-lessees was 90,000,00 gallons (R. 334). The total dollar volume of sales of refined petroleum products in 1957 by respondent was $347,900,000 (R. 211).

4. Union Oil Company sold approximately 11.5% of all gasolines sold through service stations in the State of California (R. 38).

5. By 1957, out of the total of 2,003 service stations under possessory control by Union in the eight western states set forth above, 1,978 were retail dealer consignment stations. Out of the total of 2,116 non-lessee dealers, 1,327 were on retail price fixing consignment (R. 334).

6. Union sold as much as 250,000 gallons of unbranded gasoline in any six month period to 14 independent refineries and distributors (R. 335-336). Petitioner showed that many of these distributors operated retail outlets either directly or through lessees who attempted to retail gasoline at prices 2¢ below those set by Union (R. 493, 508; R. 525, 532; R. 539, 545).

7. Union operates, as company operated, 12 service stations in California (R. 333) and 2 in the State of Washington (R. 333).

8. Union operates a chain of off brand service stations in the State of California operating under the name of Westways (R. 446-449).

(b) The Retail Dealer Consignment Agreement Program.

(i) *Chronology*

Prior to 1955 Union did not have consignment agreements (R. 91, 343-345). On or about December, 1954, Union Oil decided to control the retail price of dealers, in certain localities, "when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level." (R. 223-234). The method to be used to accomplish this was the Retail Dealer Consignment Agreement (R. 223, 224-230).

Letter, 12/24/54, R. 223-224:

> "We attach draft of the Retail Dealer Consignment Agreement to be used when the competitive price conditions in certain neighborhoods deviate so much from our established prices that it becomes necessary for us to reduce our fair trade price to a more competitive level. This agreement temporarily suspends our normal buy and sell arrangements on gasoline, making the dealer our agent for the sale of our gasoline consigned to his storage. . . ."

Letter, 3/9/55, R. 231-232:

> "So there will be no misunderstanding, the following information is presented to supplement the information contained in our first letter: A change in our selling price is necessary because of our two new Gasolines whenever we decide to drop our fair trade price, appoint our dealers as consignment agents and nominate the price for which they are to sell our Gasoline. In all cases in the neighborhood or community where we elect

to do this, the selling price nominated by us for premium gasoline will be 3¢ over major competition in the community and regular gasoline will be 2¢ over regular competition.

Where we decide to put this program into effect, it should be done quickly; in other words, follow the competitor on the hour by the hour and when competitors move down, be flexible enough so that you can move right along with them.

The neighborhood or the community must in all cases include all stations in the community that has been set up as the geographic area that we have previously determined is the logical area of influence of a similar price.

The margin in the consignment agreement before rent will be 5 and 5½¢ and we believe the agreement is self-explanatory so that after we start the program and later the cut price situation cleans up and we would nominate a price equal to or above our former fair traded price, . . . the dealer's margin would advance to the same margin he normally made when we were fair trading . . ."

On or about March 10, 1955 it was decided not to make the retail dealer consignment a temporary arrangement, but to make it permanent. The instructions were:

"We attach copies of revised Retail Dealer Consignment Agreement to be used, as outlined in our letter of March 9, when the competitive price conditions in certain neighborhoods require a change in our retail selling price, then this plan

is adopted for a given trading area, which will comprise all of the area within a marketing station boundary (with the exception of those metropolitan areas which have been divided into economic trading zones), it will be offered to all dealers within the nominated area." (Letter 3/10/55, R. 233).

(ii) The One-Year Lease Policy

The Union Oil Company at all times herein since 1952 has issued only one year leases (R. 213-223).

The one year lease requires the lessee to pay rent to Union Oil Company and assume all the risks of the enterprise (R. 19-27). The lease of the respondent required petitioner to pay it rent fixed at 2¢ per gallon plus a small monthly charged or a fixed sum referred to as "fixed monthly rental" (R. 21). The lease required the lessee to keep the stations open for so many hours per day. In the case of petitioner, it was 16 hours (R. 23). Lessee is to: pay for any repair or damage under or within lessee's reasonable control (R. 23); pay all taxes on the products, property and improvements of lessee; pay all license fees, all excise taxes levied on the handling, storage, withdrawal, distribution, sale or delivery of products handled or sold by lessee; pay all water, gas, heat and electricity (R. 24). Lessee is to pay all compensation, insurance, unemployment insurance, old age benefits, annuities and retirement benefits as to his employees (R. 24-25). Lessee agrees to hold lessor harmless from personal liability and agrees to carry public liability insurance in amounts and with insurance satisfactory to lessor

(R. 26). A good faith deposit of $50.00 is required of the lessee (R. 26-27).

(iii) The Retail Dealer Consignment Agreement

The retail dealer consignment agreement is a gasoline products delivery agreement by which the dealer is to maintain the trademarks of Union on his pumps and other facilities through which gasolines are dispensed (R. 95). Respondent's counsel has stipulated that Union Oil Company will not do business with anyone who violates the terms of the agreement (R. 379-380; 401-402; 417-419). The dealer could not, under respondent's consignment agreement, repaint the whole station and dispense another company's gasolines at his station without ouster (Id., R. 434-435).

The retail dealer consignment agreement provides that consignor reserves title to the gasoline and consignee will "sell consignor's gasolines at prices from time to time specifically authorized by consignor in writing" (R. 95). The agreement provides as follows:

(a) The risks of operation, storage, loss, evaporation, taxes and handling charges are on the consignee (R. 95-98). The one exception is loss from a natural catastrophe (R. 97-98).

(b) Consignor agrees to pay the property tax on stored gasoline, if any (R. 100).

(c) Consignee must carry insurance to cover the operations of the station, including public liability

and personal property insurance. The costs of insurance as to the stored gasoline is on consignee. Paragraph 5 provides (R. 97):

> "He [consignee] will pay for all expenses, costs, licenses and fees incident to or in connection with his business or the operation thereof including, but not limited to, all occupational, business excise or other taxes levied or imposed upon the operation of said business, and upon the handling, storage, sale and delivery of gasolines hereunder and will promptly reimbuse Consignor therefore in the event the same be paid by Consignor in the first instance. . . ." (insert added).

(d) Consignor purported to agree to pay a minimum commission to the dealer (R. 99-100). The record showed the respondent refused to guarantee the commission at all times herein. The record is undisputed as to the following facts (R. 427-428).

In February, 1958, respondent determined to do away with the guaranteed minimum commission (R. 285). Instead the dealer was given a letter which purported to allow a minimum commission, but the letter gave respondent the right to revoke its provisions at any time by written notice (R. 287-288). Under the new arrangement the dealer was to absorb 20% of the difference between authorized retail price and normal retail price when authorized prices went below "normal retail" prices (R. 285). Normal retail was $.045 per gallon over Union's Dealer Sales posted tank wagon price for both Royal 76 Gasoline and 7600 Gasoline (R. 282).

The change in commissions was to be effectuated as follows (R. 286):

"3. You will review the consignment agreements of those dealers who refuse to sign a mutual cancellation of such agreement and you will serve a thirty-day notice of cancellation at the applicable time. After such cancellation you will sign the dealer to the new consignment agreement and give him letter No. 1 which will be effective as previously stated. It is imperative that you do not miss a cancellation date because by doing so you could delay the effective date of this new commission policy by one year."

On April 15, 1958, the respondent again changed its commission schedules (R. 70-85). The consignee was to absorb changes in the retail prices by a sliding scale which provided for dealer absorption of 20% of any reduction in price below normal retail (R. 82-85). The instructions of respondent continued to be: "there will no longer be minimum commissions shown in the Consignment Agreement" (R. 76). Again, the respondent reserved the right to terminate the commission at any time by written notice (R. 79). The change in the consignment agreement was to be accomplished as follows (R. 77-78).

"1. New dealers will be signed to the new agreement and concurrently therewith they will be given the special letter which will be effective until all retail consignees in a specified geographical area are signed to the new Consignment Agreement.

2. Our present dealers will be urged to sign the new Consignment Agreement immediately and

concurrently therewith we will give them the special letter which will be effective as set forth for new dealers.

3. A thirty-day notice of cancellation will be served on all our present consignee dealers who refuse to immediately sign the new consignment agreement. After the cancellation becomes effective we will then sign the dealer to the new agreement and give him the special letter which will be effective as previously set forth herein."

(e) The record showed that the dealers paid respondent for the gasoline at the time of delivery for the delivered gasoline (R. 170-171, R. 80). The only gasoline actually not paid for by the consignee was the initial gasoline stored at the service station when first occupied (R. 311). Thereafter the dealer paid respondent when the gasoline was delivered to him (R. 170-171, R. 80).

The dealer under the terms of the agreement pays the respondent the authorized price for gasoline, less his commission, but his commissions are dependent on the difference between Union's wholesale tank-wagon price and the authorized or minimum retail price (R. 99-100). Ordinarily the dealer will thus pay respondent the same price as he would if he had bought at respondent's tank-wagon prices. This would be subject to the provisions of the agreement which stated that when authorized prices were lowered to a point below respondent's posted minimum price, the dealer absorbed 50% of the difference (R. 100). This in turn would be subject to the provisions relating to a guaranteed commission (R. 100).

(iv) The Purpose, Effect and Means Used Pursuant to the Respondent's Retail Dealer Consignment Program

This appeal presents stipulations and undisputed facts as to the purposes, means used and effect of the retail dealer consignment program.

It is stipulated that the purpose of the retail dealer consignment agreement program was, among other things, to control retail sales price (R. 415, 429).[5]

The consignment agreement program was admittedly used to fix uniform and non-competitive prices in the western states by which all dealer choice was surrendered and by which Union determined to establish prices as a matter of its determination alone.

At times the uniform retail prices authorized by Union were to be higher than "major" competition. At times the prices were to be those charged by Union's competitor, Standard Stations, Inc. (Letters, 12/24/54, R. 223-224; 3/9/55, R. 231-232; 4/7/55, R. 246-248; 9/21/55, R. 255-256; 9/10/56, R. 276-277; 2/28/58, R. 281-284; 4/15/58, R. 72-76.)

As an example, effective March 1, 1958, the following was Union's consignment price policy in the western states, R. 282-283:

> "A. Normal or above normal markets, all areas: Prices on both Royal 76 and 7600 Gasolines will equal predominant competitive major gasoline prices.

[5]The stipulations of counsel for respondent as to purpose are set forth herein in Appendix C, Part I.

B. Depressed markets: Subject to General Provision C (1).

(1) In all areas excluding Montana, Wyoming, North Dakota and portions of Rocky Mountain Division covered in 4 B (2) below:

(a) 7600 Gasoline will be equal to predominant competitive major prices or Standard Stations, Inc., prices if latter are lower.

(b) Royal 76 Gasoline will be $.05 per gallon over the authorized 7600 Gasoline price, but not more than $.01 over predominant competitive major prices."

The authorized consignment agreement prices were to be policed. On April 7, 1955, the General Sales Manager, Dealer Sales, wrote Union's division officers, as follows (R. 247-248):

"We advised you that very careful figures should be kept indicating the number of stations, the location, gallonage before the price drop, and a running record of gallonage secured after the price drop; and a very rigid control should be placed into effect so that we know the Retail Reps. and the Sales Manager are carefully policing the establishment of a new nominated price for any service station so that they know it conforms with our instructions as outlined above."

Price notification letters were used by Union informing the dealer of the specific price to be charged (R. 272-276). In addition, retail price changes were accomplished by telephone calls to the dealers, by visits of the Union agents to the stations, and by the prices shown on the gasoline delivery ticket at the

time of delivery of the gasoline to the dealers (R. 489). The dealer could not match the off brand dealers' prices, if desired (price policy letters, supra).

In order for the independent business man to lease a service station property from Union Oil Co. he had to sign the retail dealer consignment agreement. This is stipulated (R. 379-380; 386-387; 417-418).[6] The dealer "either takes the package deal or he doesn't take the gasoline station" (R. 417-418). In the words of respondent's counsel, "either he took our consignment contract and our lease or we wouldn't deal with him" (R. 380).

By the fall of 1956, the respondent determined to terminate all relations with all lessees and master dealers who refused to abide by the consignment program (R. 277-278). The company's instructions were as follows:

Letter, 9/10/56, R. 276-277:

> "We advised you that every possible effort must be continually exerted to get all of our dealers on a consignment program."

Letter, 10/17/56, R. 277-278:

> "Our attempt has been to strenuously solicit the change over from products contract to consignee agreements and this effort must be continued and accelerated as we expect that in the near future we will have to review every dealer that has not agreed to go along on our consignment basis to

[6]The stipulations of counsel for respondent as to the conditioning of the one year leases on the signing of the consignment agreement are set forth herein as Appendix C, Part II.

determine what action we need to take, even to the point of deciding that we should lose the business.

In view of the above instructions which you have been working on, we are not willing to enter into a products contract with a reseller, 100% account, two-party deal or 'other' and the only paper we will write is a one-year consignment agreement."

In 1956 there were 765 cancellations of leases (R. 156). 559 cancellations were mutual cancellations for other than financial difficulties (R. 156. Compare with R. 286).

The one year leases of the respondent would not be renewed with a dealer who refused to follow the price fixing directions of the respondent. This is stipulated as has been seen at R. 379-380; 386-387; 417-418, 429, Appendix C, Part II herein. It was stated at the Pretrial Conference of May 21, 1959, at R. 401-402:

"The Court. Mr. Lasky, isn't it your contention that even if you do cancel out everybody that has a one-year lease and who violates the consignment agreement, that you are still entitled to summary judgment?

Mr. Lasky. Yes.

* * *

Mr. Keith. You specifically said on this issue that you felt it would be legal if the company would refuse to allow a lessee renewal of his lease if he didn't sign the consignment agreement, is that correct?

Mr. Lasky. Yes, I said that. That is my theory. And I also said that even if it were true that we had refused to renew four or five others for like reasons it wouldn't make any difference. I said that. . . ."

It is respondent's policy, however, to renew its one-year lease on a continual basis with all those who do follow Union's policies (R. 441, 450-452).

The independent service station dealer must invest substantial sums in order to go into the service station business (R. 66).

The record further showed that the effect of the retail dealer consignment agreement program was to effectuate exclusive selling of gasoline at thousands of outlets.

In 1957 respondent sold a total of 392,000,000 gallons of gasoline in the State of California to 2,365 stations (R. 334). At 2,364 stations there were no other gasolines dispensed except Union's (R. 336-337). Dealers were not allowed, under the consignment agreement program, to handle the gasoline products of other companies and repaint the stations (R. 434-435).

As heretofore stated, Union distributed thousands of gallons of gasoline to off-brand dealers who retailed at prices below the authorized retail consignment prices of Union.

One such off-brand company was Sunland Refining Company (R. 336).

The deposition of the Sunland representative disclosed that respondent's agents in Fresno had a con-

versation with the Sunland official about the price war in the area of petitioner's service station at 4010 E. Ventura Ave., Fresno, California in 1958 (R. 516). The representative testified that Union and other oil companies were "working" to bring the prices back up (R. 517-518).

4. The Undisputed Record in Summary Judgment Was That Respondent Refused to Renew Petitioner's Lease Because He Refused to Abide by the Price Fixing Directives of Respondent.

The stipulations of counsel for respondent appear at R. 409:

> "Mr. Lasky. . . . You said it would simplify the presentation of the case and therefore in the brief we have filed we have said for the purposes of this case we will now take the position we did not give him a new lease because he violated that consignment agreement. It is a conceded fact in the case that he did violate the consignment agreement because he refused to charge the prices which his principal, the Union Oil Company, prescribed for him to charge."

And see also R. 299.

5. The Unchallenged Facts As to Petitioner's Testimony of Coercion, Protest and Ouster.

The record shows the following testimony by petitioner in his deposition. Petitioner had been an employee of respondent (R. 302-303). After advancements, he was discharged from respondent's employ (R. 304-305). He was offered by Union any of its service station properties (R. 305). The service station site chosen by petitioner herein was a beautiful site (R.

307). It was described by respondent's representatives as a "good service station in the future" (R. 306). They were "glad to have me as a dealer" (R. 306). In order to obtain the station petitioner invested approximately $3,361 (R. 310-311). Union sold inventory to petitioner under a conditional sales contract for around $1400.00 (R. 310). The lease of petitioner provided the station was to keep open 16 hours a day (R. 23). The lease and consignment agreement were signed when petitioner checked into the station at 4010 E. Ventura Ave., Fresno, California. At the time of the signing of the one year lease in May, 1956, and the retail-dealer consignment agreement, petitioner said, " 'Do I have to sign this . . . and halfway jokingly and knowing that I had to' " (R. 309). During the period May, 1956 to the time of the signing of the second lease, petitioner had numerous conversations with representatives of Union. He requested more commissions, or asked for reductions in wholesale prices (R. 461, 462, 469). He remembered protesting the term "and will abide thereby" on the price forms of the respondent. He struck out the words (R. 473).

At the time of the signing of the second lease in May, 1957, petitioner protested the consignment agreement (R. 475). He did not remember the precise time involved, but remembered that he told the respondent's representative, a Mr. Pinochi, that he desired to be a purchase and sale dealer (R. 475). Petitioner testified he desired to set his own prices at all times (R. 316).

Starting in the Spring of 1957 (R. 65), the highway fronting petitioner's station was under heavy con-

struction (R. 65). In the fall of 1957 construction on petitioner's side of the highway commenced and petitioner's driveway was torn up (R 483).

In April, 1958, the competitors of petitioner lowered the price of their house brand gasoline to 27.9¢ (R. 486).

In April, 1958, petitioner requested that he be allowed to meet the price of 27.9¢ for regular gasoline from a Mr. Campbell, a Union representative (R. 484, 486). Petitioner's request was refused and he was told to charge a higher price (R. 485). Petitioner persisted in charging 27.9¢ (R. 486). A Mr. Christopher, Union's Division Sales Manager, Fresno (R. 93), then came marching into petitioner's station (R. 484). He wanted petitioner to "put my price up" (R. 484). Petitioner testified, R. 485:

> ". . . And I don't remember the exact words at all, but then they intimated by his actions and words that if I didn't put the price up to where they wanted it, which was two cents above my competitors, that I wouldn't get another lease. . . . I refused to put the price back up, and he said that he was going to call Los Angeles and Mr. Rath, and do everything in his power to force me to put the price back up. That is all I recall at this time of the conversation."

On April 21, 1958, petitioner was notified that his lease would not be renewed (R. 491-492). A Union representative, a Mr. Campbell, told Mr. Simpson that he had recommended that petitioner's lease be renewed if he would agree to conform to the consignment pro-

gram (R. 492). Mr. Campbell stated that the only reason the lease was not being renewed was that petitioner had set a price different than ordered (Id.).

Petitioner protested the lease ouster and did all he could to maintain himself as a lessee. Between the time of his notification of lease cancellation, on April 21, 1958, and the filing of his complaint for injunctive relief on May 21, 1958, petitioner attempted to obtain a change in respondent's determination to oust him by urging public support for his position (R. 37-42). He solicited his customers to send letters to the Chairman of the Board of Directors of Union (Id.). Respondent received 230 letters supporting petitioner's ability and position (R. 39).

Respondent, however, refused to change its position and dispatched its General Sales Manager, Dealer Sales (R. 37), Mr. Rath to visit petitioner. At the meeting with petitioner, Mr. Rath warned him not to oppose Union. Petitioner testified he was told as follows, R. 479-480:

> "Q. And what did you say to Mr. Rath and what did he say to you?
>
> A. I don't recall the exact words at all, but he came there that day. He had to come around about 4:00 o'clock to get in the place, because it was impossible to get—to come in the front way, and he remarked that they had me pretty well blocked off. They even had sawhorses across the street that he came down, and after pleasantries, he wanted to know how I was; he said that he heard that I had planned not to leave the service station when my lease was up, and I

said, well, I didn't know where he had heard it, but he said, 'Well, you are going to have to leave.' I said, well—I said very little. As a matter of fact, Mr. Rath did most of the talking, but I recall that he told me about two dealers down in Los Angeles that had refused to leave, and he said that they had thrown them out bodily, and he said that he, through his past associations and knowing me, didn't want to see me get hurt. And he also said the Union Oil Company had a lot more money than I did, and that it was foolish for me to try to sue them or anything, because I didn't have the money. And he said, 'You are going to go out when your lease is up, within the hour', as I recall, or words to that effect. Immediately, anyway. And I said, 'Well, maybe so, but you better keep it legal.' And he said, 'Whether we do or not, you are going to go out.' So that is mainly what I remember about the last conversation."

Petitioner had worked up to 16 hours a day, every day of the week for the two years, with only 14 days off work in the two years (R. 40, 67).

Following his ouster, he leased a Mobil service station on July 3, 1958 (R. 321). He went into partnership with another person, thus reducing his income by one half of that shown at R. 323.

6. Damages.

Respondent below submitted the damage calculations of the petitioner to the district court below and requested summary judgment on all issues including damages (R. 298; 313-314; 324-329).

Petitioner at no time indicated in any way he would be limited by the depositions as his only offer of proof on the damage issue. Just the opposite occurred.

The petitioner had been requested by the district court to file a statement of the nature of his evidence re damages and a memorandum in support thereof (R. 106, 108). The statement appears at R. 190-196. At no time did petitioner withdraw this pretrial statement.

7. Opinions Below.

The district court ruled that the retail dealer consignment program of the respondent was lawful (R. 355). It also ruled that petitioner had no actionable damages since Union had no duty to offer petitioner a new lease (R. 357-358). It also ruled that petitioner's damages were so speculative and conjectural that the case should not reach a jury (R. 358-359).

The opinion of the district court did not analyze the legality of the retail dealer consignment in terms of the purpose, means used, and effect of the price fixing program. As to the petitioner's action arising from the forced ouster, it ruled that there could be no injury since "Union was under no obligation to offer plaintiff a new lease even if plaintiff had complied with the terms of the consignment agreement," (R. 357). As to the claim for injurious impact arising from the coercive fixing of petitioner's prices, the Court ruled that both the doctrines of pari delicto and volenti non fit injuria precluded recovery (R. 359).

The Court of Appeals affirmed the judgment of the district court, but based its affirmance upon different grounds. It did not rule on the legality of the retail dealer consignment agreement program, but assumed it illegal (R. 570). Rather it held that petitioner had no actionable damages under the tort doctrine of "consent", Restatement of Torts, Sec. 892 (R. 571). It held that it was proper for an appellate court to determine whether or not there were categories of dealers who could not claim damages for forced ouster and loss of their business under respondent's scheme (R. 571). It then placed the dealers of Union into two categories; those who were under leases at the inception of the retail dealer consignment program in 1955 and those who leased property knowing of the respondent's demand that the consignment agreement be signed (R. 571). As to the latter, it held that these dealers had freedom to accept or reject the tendered lease and consignment agreement and thus had no claim for actionable damages from respondent (Id.). Thus, as to the claim for damages arising from petitioner's ouster, the court ruled that the original consent to the lease and consignment agreement prevented recovery under the doctrine of "consent". As to the claim for damages arising from the coercive fixing of petitioner's prices, the court ruled that petitioner could not predicate a claim on "coercion" since there was no inability to fix prices at desired levels, but only the risk that if prices were set according to the dealer's judgment, his lease would not be renewed (R. 572).

VI

SUMMARY OF THE ARGUMENT

Petitioner's claims for damages under Section 4 of the Clayton Act are well established under the decisions of this Court. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). This action is based on the use of a short term lease to support an unlawful retail price fixing consignment program. Petitioner attempted to set retail prices of gasoline delivered to him by Union at prevailing market prices while in business for his own account as an independent service station lessee. Respondent threatened petitioner that unless he conformed to the price orders of respondent it would do everything in its power to force petitioner to put his prices back up to those established by respondent (Answer, para. 17, R. 93; R. 485). Petitioner thereafter continued to establish market prices of his own judgment (Answer, para. 18, R. 93). The respondent refused to renew petitioner's one year lease because he did not abide by price orders (R. 409). Petitioner was to be made a conspicuous example of the futility of seeking freedom to set one's price in Union's regimented dealer structure (R. 479-480). As a result petitioner lost his service station business (R. 409). It was respondent's policy to renew indefinitely one year leases to all those who followed Union's policies (R. 441; 450-452). Petitioner had invested substantial sums for his business (R. 66).

Union claims the right to fix retail prices by using fear of loss of the service station business under the

doctrine that a single trader may consign its products to agents and fix the retail price of the agents. *United States v. General Electric Co.*, 272 U.S. 476 (1926). It claims that a consignor may destroy the business of a consignment agent for disobeying price orders.

But a major oil company that has control of thousands of service stations so that it has the power to impose an appreciable restraint on free competition cannot compel all those who desire to lease service stations to allow it to fix uniform, non-competitive market prices. It thus utilizes its leases to injure interstate trade and commerce by depriving independent dealers of the exercise of free judgments as to whether to become consignees at all and to sell in accordance with their own judgments as to price. The power to lease is not the power to regiment a marketing organization into an exclusive dealing, price fixed organization. Further, Union could not, compatible with the Sherman Act, adopt means which compel independent business men to abide by Union's price fixing orders. The right of "refusal to deal" does not embrace a system of compulsion by which dealers must obey price orders or lose their entire business. Whether the system be called consignment or resale price fixing is not material. These are bold, predatory and ruthless means which stifle freedom of competition. *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280 (1951). In *Richfield* it was held that a major oil company can not do business with independent lessees and master dealers, by compelling them to agree to

abide by its orders as to where they could obtain their gasolines and automotive accessory supplies by the means of cancellation of short term leases and by threatening to cancel all business relations with the independent dealers. It is urged that exactly the same unlawful means cannot be used by a major oil company to enforce a system of thousands of identical price fixing agreements in interstate commerce. The Sherman Act protects dealers from the use of predatory weapons which prevent them from doing business in accordance with their own independent judgments. Thus when companies adopt means which go beyond a mere refusal to sell supplies, and instead utilize a short term lease to coerce judgments as a means of regimenting prices, they are in violation of the Sherman Act. There is no anti-trust defense to such tactics. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951). That a one year lease may be validly terminated for lawful purposes is not a defense to an action for treble damages when it is used for the purpose of fixing market prices against the independent judgments of those who are in business at their own risk and are facing competition in the market place. That lawful means may be used to control an agent's price under a bona fide consignment agreement, does not allow a defendant the right to use unlawful means to compel dealer obedience to price directions. *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

The refusal to renew petitioner's lease for the reason that he desired to set a price other than that fixed by Union on its competitive dealers not only caused petitioner to lose his business, but it also proved that his prices were coerced by Union while he was a dealer. As such he was a victim of predatory practices. Although a dealer faces the possibility of loss of business relations with a supplier for bona fide reasons, a supplier who holds real property marketing outlets is unable to control the competition of independent dealers by doing business only under short term lease forms and then refuse to renew the leases of those who do not abide by orders which restrain competition. The leases are wholly independent of the supply agreements. Under the Sherman Act, a supplier is unable to fix uniform and non-competitive prices on thousands of otherwise competitive dealers by the means of fear of non-renewal of short term leases. *United States v. Richfield Oil Company*, supra. Small independent dealers who experience the practice are victims of a predatory practice and are entitled to sue for both "in station" damages and damages based on the loss of a business under the Clayton Act.

Emich Motors Corp. v. General Motors Corp., supra;

Osborn v. Sinclair Refining Co. (4th Cir., 1960) 286 F.2d 832;

Ring v. Spina (2nd Cir., 1945) 148 F.2d 647;

Hartford-Empire Co. v. Glenshaw Glass Co. (W.D. Pa., 1942) 47 F. Supp. 711;

Allgair v. Glenmore Distilleries Co. (S.D. N.Y., 1950), 91 F. Supp. 93.

The means used by Union to compel price obedience whether unlawful per se or not cannot be used to support an unlawful system of identical price fixing consignment agreements promulgated for the purpose of fixing prices and used to effect the fixing of uniform and non-competitive prices in interstate commerce.

The respondent's retail dealer consignment program is in per se restraint of interstate trade. (1) Each retail dealer consignment agreement is in restraint of trade. It attempts to allow the right to fix retail prices of gasoline delivered to retail dealers. But the dealers have all the risks of ownership of the gasoline. Respondent required the dealers to share price decline risks. The dealers carried insurance on the gasoline and were liable for loss except as to natural catastrophies. The dealers were responsible for most of the costs and taxes on the business. Thus Union is fixing an owner's resale price. This is beyond Union's power. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *White Motor Company v. United States*, 372 U.S. 253 (1963). (2) Union compels all dealers to allow it control of prices of delivered gasolines. It thus regiments the dealer organization, precludes all price competition and fixes the amount the public shall pay. The use of non-renewal of a short term lease is as effective in constraining the dealers' prices as is an agreement with wholesalers to cut off errant dealers. The dealers have no alternative but to obey price orders. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). (3) Union used the consign-

ment agreement as a hub to compel all dealers to follow or go above the prices of major oil companies; the dealers were to follow such prices or lose their businesses. But the effect of such a system on interstate commerce is to regiment otherwise competitive dealers into charging the public uniform and non-competitive prices. Regardless of whether or not the consignment agreement is valid at common law, the effect of such a system is to accomplish that which the Sherman Act forbids, agreements to fix prices on commodities moving in the stream of interstate commerce. The federal courts are to look at the competitive realities of those who receive the delivery of commodities under price fixing agency agreements to determine whether or not the Act's prohibition of price fixing schemes has been violated. If the purpose is to fix prices of competitors and the agreements are used to establish fixed prices the promulgator of the scheme has violated the Sherman Act. *United States v. Masonite Corporation,* 316 U.S. 265 (1942). (4) Further, Union determined to police so-called consignment prices. It had representatives appear on the dealers' service stations to order prices to be fixed, threatened the dealers with lease non-renewal and refused to renew the leases of those who were reported as desiring to establish their own retail prices in accordance with their own judgments. This was a compliance system compelling obedience to price orders, and beyond the limited dispensation of the *Colgate* case. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *United States v. Parke, Davis*

and Company, supra. (5) Union's plan of fixing prices by identical price fixing agreements, not only violated the Act's prohibitions against price fixing, but it also violated other prohibitions. Union could not destroy the business of worthy men whose lives and personal fortunes were invested in the service stations' facilities in a dispute over the acceptance of a gasoline delivery, consignment price fixing agreement or over authorized prices. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457 (1941). (6) In the very area of asserted self justification, "agency", the facts proved that the retail dealer consignment agency effectuated exclusive dealings in Union's gasolines. Thus the claimed purpose of the respondent to deal only with agents and only with agents who abide by its orders effected a complete shut-out of competitive gasolines in thousands of market outlets in the eight western states (R. 336-337). This was in restraint of trade. *United States v. Richfield Oil Company*, supra. The consignment agreement was not only a price fixing agreement, but an exclusive dealing contract as well.

Finally, Union violated the provisions of Section 2 of the Sherman Act. The control of the prices and supplies of 3000 independent market outlets was the specific intent of Union and it succeeded in its goal. Predatory weapons of threats, of lease ouster, of policing, of asserting that it was foolish for the dealers to use the courts were used to accomplish this end. The service station dealers are independent business men who invest their personal fortunes in the stations, the

risks of the business are on them and they are entitled to the protection afforded by Section 2 of the Sherman Act from the plan to control their businesses shown here. *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Eastman Kodak Co.* (D.C. N.Y., 1915), 226 Fed. 62.

The petitioner has proved the two elements of his Section 4, Clayton Act action: violation of the antitrust laws to his injury. *Radovich v. National Football League, et al.*, 352 U.S. 445 (1957). The Court below ruled that "consent" was a defense as a matter of law; that the petitioner knew that he would be injured when he voluntarily accepted the consignment plan promulgated by Union and used by Union as the only way it would do business. This, it was held, precluded recovery. Clearly this defense allows one to use a coercive tie-in as a means of escaping treble damage actions. The defense of consent is clear judicial legislation and is in conflict with this Court.

The cases of this Court which sustain the causes of action here, involved dealers who had knowledge of the defendant's scheme, or, had been in pari delicto with the defendant. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

The Sherman Act and Clayton Act were enacted to provide a remedy to independent traders against those who were coercing agreements in restraint of trade. The violations of the Sherman Act produces

two consequences; governmental action and private actions for treble damages. In the private action, any alleged unlawful conduct of the plaintiff does not legalize the unlawful conduct of the defendant nor immunize the defendant from liability to those it injures. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). The plaintiff's knowledge that he will be injured by the defendant's violation of the antitrust laws if the plaintiff should violate the antitrust laws is not a defense to the defendant. *Moore v. Mead Service Co.*, 340 U.S. 944 (1951).

The Sherman Act has declared the wrong and has established the remedy. The federal courts are not free to add defenses to Congressional causes of action. The dealer of Union under the consignment agreement would be liable to Union for payment of the gasoline delivered to him. The dealer's protection against Union's restrictive policies is as a matter of Congressional purposes to be determined in a Section 4, Clayton Act action. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

The doctrine of "consent" cannot possibly apply to Sherman Act violations, because when the violation is assumed, as here, the defendant is, as a matter of judicial enforcement of Congressional purposes, utilizing powers beyond his rights. Private agreement does not erase the violation. Here, moreover, the complaint alleged and the proof showed actual economic coercion on independent business men. "Consent" and "coercion" are contradictions in terms. Restatement of Torts, Sec. 892. There is duress here:

the continuation of an expected long term business was used to deprive one of freedom of choice. Threats were made to the dealers that they agree to abide by Union's plan or face the consequences of loss of a business. This is not free consent; this is coercion. Restatement of Torts, Sec. 871, comment f, pp. 419-421; Restatement of Contracts, Sec. 492.

There is no defense available to respondent here.

In petitioner's second section of the brief, it is urged that the stipulations of respondent and undisputed evidence in summary judgment prove the violations of the antitrust laws set forth above. The record proving unlawful means, purposes and effect is in the form of stipulations and policy letters of Union's General Sales Manager. The undisputed evidence shows that the purpose, effect and means used by respondent to promulgate and maintain a system of identical price fixing contracts, regardless of dealer free choice or independent judgment, is in violation of Sections 1 and 2 of the Sherman Act.

It is urged in petitioner's third section that even assuming the stipulations and record of purpose, effect and means are not sufficient to determine liability in summary judgment, clearly petitioner is entitled to a trial by jury on all issues. *Poller v. Columbia Broadcasting System, Inc.*, supra.

VII

ARGUMENT

I. PETITIONER'S CAUSES OF ACTION ARE SUPPORTED BY THE DECISIONS OF THIS COURT.

A. The Decisions of This Court Involving Dealers Who Have Lost Their Supplies or Business Opportunities Because of Refusal To Abide by Demands Which Restrain Trade Have Sustained Claims for Damages Under Section 4 of the Clayton Act Regardless of the Dealers' Knowledge of the Suppliers' Unlawful Plans or His Participation in Them.

1. Petitioner's claim for damages based on loss of his business by the use of a short term lease as a weapon to control his price judgments as part of an unlawful price control system is well settled.

The first three questions of petitioner herein are phrased to state the undisputed facts in this case (R. 299, 409, 429, 401-402, 333, Appendix C, herein). Petitioner's causes of action are sustained by the decisions of this Court. This Court has ruled that when suppliers utilize the weapon of cancellation of leases, *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, (D. C. So. Cal., 1951) 99 F. Supp. 280; or cancellation of franchises, *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); or cancellation of licenses, *Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923), in order to compel the plaintiff to join an unlawful plan or as punishment for refusing to abide by the unlawful demands of the defendants they are liable for treble damages. Indeed, the mere refusal to deal with a plaintiff as part of an unlawful scheme or as punishment for not bending to the will of the defendant who is attempting to restrain or monopolize interstate

trade or commerce raises a private antitrust action. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *United States v. Parke, Davis & Company*, 362 U. S. 29 (1960); *Radovich v. National Football League et al.*, 352 U.S. 445 (1957); see also *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied, 366 U.S. 963 (1961). See also *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 at 625.

That the use of the cancellation of franchises, contracts, and leases to support illegal plans under the Sherman Act raises treble damage actions even though agreements may be otherwise cancelled under their terms is well established. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464 (1962); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951); *Silver v. New York Stock Exchange*, ___ U.S. ___, 83 S. Ct. 1246 (1963).

See also *A. C. Becken Co. v. Gemex Corporation* (7th Cir., 1959) 272 F.2d 1; judgment for plaintiff, (D.C. Ill., 1962) 204 F.Supp. 28; affirmed, in part, (7th Cir., 1963) 314 F.2d 839.

The liability of the defendant or defendants has been sustained even though the plaintiff had knowledge of the defendant's illegal plans. Thus in *Emich Motors Corp. v. General Motors Corp.*, supra, Emich Motors had become a franchised Chevrolet dealer well after GMAC adopted a policy of meeting with dealers to demand that the dealers only deal in its financ-

ing. Emich Motors was a franchised dealer from the period 1932 to 1936 (340 U.S. 558 at 562). But the program of coercive tie-in by General Motors and GMAC commenced in 1925, (7th Cir., 1941) 121 F.2d 376, 394, cert. denied, 314 U.S. 618 (1941).

In the *Southern Photo Materials Co.* case, the plaintiff had dealt with the defendant as a dealer and had followed its restrictive policies prior to the defendant's cancellation of business relations with the plaintiff.

Further, there is no defense of pari delicto or consent available to the violator since the cause of action arises from the defendant's using the loss of commercial relations as a weapon to coerce the plaintiff following the plaintiff's protest and refusal to obey.

The law was summed by the Second Circuit in 1945, *Ring v. Spina* (2nd Cir., 1945) 148 F. 2d 647, at 652:

> "Thus, it is well settled that dealers and solicitors for a combination may sue as soon as they are dismissed and claim damages for such dismissal. *Victor Talking Mach. Co. v. Kemeny*, 3 Cir., 271 F. 810; *Straus v. Victor Talking Mach. Co.*, 2 Cir., 297 F. 791; *Connecticut Importing Co. v. Frankfort Distilleries*, 2 Cir., 101 F. 2d 79; *Connecticut Importing Co. v. Continental Distilling Corp.*, 2 Cir., 129 F. 2d 651, certiorari denied . . . 317 U.S. 664 . . ."

In *Connecticut Importing Co. v. Frankfort Distilleries*, (2nd. Cir., 1939) 101 F.2d 79, 81, the Court specifically held that plaintiff's prior participation in an unlawful plan was irrelevant in an antitrust action

for damages arising from a refusal to deal by defendants as a result of plaintiff's refusal to abide by the conspiracy's price directions.

"The defendants assert further that the plaintiff cannot recover since, if there was an unlawful agreement, it was a party to it and so in pari delicto with them. The plaintiff has urged that such a defense is unavailable because not pleaded as required by the Connecticut procedure but we do not find it necessary to decide that. This cause of action did not arise in any event until Frankfort Distilleries, Inc., stopped supplying the plaintiff with its products and at that time whatever connection the plaintiff had had with the conspiracy was severed and it since has not been a party to that. This is not a suit in equity where the clean hands doctrine is applicable but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose. Cases like *Eastman Kodak Co. v. Blackmore,* 2 Cir. 277 F. 694, and *Bluefields S.S. Co. v. United Fruit Co.,* 3 Cir., 243 F. 1., upon which the defendants rely and which denied recovery for the period of the participation by the plaintiff in the conspiracy, do not extend to a subsequent period when the plaintiff was no longer a party to the unlawful agreement. This suit, on the contrary, is in this respect like *Victor Talking Mach. Co. v. Kemeny,* 3 Cir., 271 F. 810, where a party to an unlawful agreement in restraint of trade recovered damages suffered after he was no longer a party to that. As the plaintiff was not in pari delicto with the defendants after this cause of action accrued, there was no error in refusing to charge as requested in

respect to that subject. And for the same reason evidence as to price lists plaintiff filed with the Board of Trade showing the prices at which it sold the Frankfort products while it was in the conspiracy were properly excluded. What plaintiff did while a member of the conspiracy was immaterial."

This Court has subsequently held that the conduct of the plaintiff cannot legalize an unlawful plan nor immunize defendants from liability to those they injured, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). In *Moore v. Mead Service Company*, 340 U.S. 944 (1951) this Court reversed the decision of the Tenth Circuit (10th Cir., 1950) 184 F.2d 338, which held that plaintiff's knowledge that he would be damaged if he undertook to violate the antitrust laws on his own was a bar to recovery. Thus, this Court in reversing has held that plaintiff's knowledge that he would be damaged by the defendant, arising from his own antitrust violation, would not immunize the defendant from his violation of the antitrust laws to the injury of the plaintiff. The subsequent judgment for the plaintiff was affirmed. *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954).

It is respectfully submitted that if a plaintiff's illegal conduct does not legalize an unlawful plan, then, clearly the plaintiff's knowledge of an unlawful plan does not legalize an unlawful plan nor does it immunize the defendant from those coerced as victims of the plan.

Clearly Simpson has a cause of action under the facts stipulated by Union, that his lease was not renewed because he refused to follow price orders and that it was respondent's plan to compel obedience to its price orders by refusals to renew short term leases (Appendix C, Part II).

B. The Court Below Erred in Not Holding That the Richfield Case Prevents Union from Using Short Term Leases as a Means of Controlling the Prices of Independent Dealers.

1. A dealer is a victim of unlawful conduct in violation of the Sherman Act when he must do business under threat of the cancellation of short term leases unless he submits to price fixing orders.

It is respectfully submitted that petitioner not only has claims for damages for loss of his business arising from his ouster in an effort by respondent to force him to abide by retail price orders, but also, he has a claim for damages against respondent in being unable to fix his own prices while an independent dealer. While a dealer, petitioner was clearly under the coercion of respondent's price compliance system. As to these "in station" damages, the learned Court below ruled that a dealer is not under a legal "inability" to fix his own market prices even though he knows that if he does he will lose his business (R. 572). But such a principle is contrary to express congressional purposes. It denies federal protection to those entitled to freedom to trade. It is in violation of the Sherman Act when a lessor and supplier utilize the cancellation of short term leases in order to compel dealer obedience to price fixing orders. This, it is respectfully submitted, is the teaching of *United States v. Richfield*

Oil Company, supra. Clearly the learned court below was in derogation of antitrust law in holding that suppliers may fashion short term leases and then use the non-renewal of the leases as a weapon to cause fear in traders so as to promulgate restraints of trade. It is the rule of Congress that dealers placed under the compulsion of such a system have a treble damage action under the Clayton Act. *United States v. Richfield Oil Co.*, supra.

In *Osborn v. Sinclair Refining Co.* (4th Cir., 1960) 286 F.2d 832, cert. denied, 366 U.S. 963 (1961), the learned court specifically allowed a service station dealer to present his evidence under claims for "in station" damages suffered upon proof that the defendant oil company coerced dealers to buy Goodyear TBA under threat of lease cancellation.[1]

See also *Jewel Tea Co. v. Local Unions, etc.* (7th Cir., 1960), 274 F.2d 217 (on remand (N.D. Ill., 1963), 215 F. Supp. 839); *Hartford-Empire Co. v. Glenshaw Glass Co.* (W.D. Pa., 1942), 47 F. Supp. 711; *Allgair v. Glenmore Distilleries Co.* (S.D. N.Y., 1950), 91 F. Supp. 93; *Enterprise Industries, Inc. v. Texas Co.* (D.C. Conn., 1955), 136 F. Supp. 420, reversed on other grounds, 240 F.2d 457, cert. denied, 353 U.S. 965.

Further there appears no reason to distinguish the cases allowing damages to growers who sell products

[1]See the remand opinion *Osborn v. Sinclair Refining Co.*, (D.C. Md., 1962) 207 F. Supp. 856. The District Court's rejection of plaintiff's recovery for damages based on his losses suffered by reason of the loss of the service station business is urged to be in conflict with *United States v. Richfield Oil Co.*, supra; and is an erroneous attempt to isolate illegal tie-ins from the rules applicable to other unlawful restraints.

to a price fixing combination at prices fixed by the combination, and petitioner's claim for "in station" damages. In each case the damages suffered flow from the force of unlawful conduct. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Clearly Simpson has a cause of action for losses incurred each day he was a Union lessee when Union interfered with his ability to sell in accordance with his own judgments by coercing such free judgments in threatening to refuse to renew his one-year lease, and by the enforcement of a strict price compliance system on him.

C. The Doctrine of Consent Conflicts with Matters of Public Policy in the Judicial Enforcement of the Antitrust Laws.

1. A Section 4, Clayton Act action is based on acts which injure a trader, and a contract with the plaintiff cannot be used by the defendant as a shield to justify his conduct in violation of the antitrust laws.

This Court has specifically held that the remedy to a buyer who has been injured by reason of an antitrust violation by a seller but in receipt of goods or property from a seller is a treble damage action under Section 4 of the Clayton Act, and that the buyer cannot use the violation as a shield to the violator's damages for breach of contract. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). *Kelly v. Kosuga*, 358 U.S. 516 (1959). Thus the violator of the antitrust laws is not outlawed from the Courts. But it necessarily follows that if the violator of the antitrust laws is not barred from an action for breach of con-

tract against one with whom he has entered into contractual relations; clearly he cannot use the buyer's supposed knowledge and assumed consent to his unlawful undertakings as a shield to his antitrust liability under Section 4 of the Clayton Act. An agreement between the parties is not a shield to either party unless it can be said the Court is actually enforcing an unlawful program. To hold otherwise would mean that the victim has lost his rights under the Sherman and Clayton Acts, and is outlawed from using rights under bills designed specifically to give him a remedy, whereas the violator of the law would not be outlawed and can collect damages based on his contracts with the party injured by violation of the antitrust laws. But this is contrary to *Bruce's Juices*. "Consent" as a shield to antitrust liability thus produces an effect clearly in derogation of Congressional purposes. As such, it can not be sustained.

2. This Court has declared that there are no judicial limitations to the plain words of Section 4 of the Clayton Act and that Congress has specifically declared that the private antitrust action is a necessary consequence of antitrust violation.

It is respectfully submitted that the decision below conflicts with this Court's determination that the private antitrust action is a primary and direct cause of action to remedy a wrong done; an action which is not to be so construed as to prevent the right to trial by jury under doctrines which void the action as a matter of law.

The Court held in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), that

private actions under Section 4 of the Clayton Act were the necessary consequences as a matter of Congressional fiat of a violation of the Sherman Act. In *Radovich v. National Football League, et al.*, 352 U.S. 445 it was held that the Court were not to burden the private litigant beyond what was specifically set forth by the Congress. It held that plaintiff's "claim need only be tested under the Sherman Act's general prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." (at 453)

Clearly, there can not be a "consent" defense consistent with Congressional purposes, when the judiciary is concerned with an antitrust action which involves price fixing agreements fashioned by a powerful oil company and demanded by it as the only manner of doing business. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

Coercion of independent traders under the Sherman Act raises causes of action, it does not end them.

The Congress not only allowed a remedy for coercion which restrains trade, but it actively encouraged the bringing of a Section 4, Clayton Act action by allowing treble damages and attorney fees.

The defense of "consent" is in conflict with the public policy of the Sherman Act as stated in the decisions of this Court interpreting Section 4 of the Clayton Act.

In *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942); *Edward Katzinger Co. v. Chicago*

Metallic Mfg. Co., 329 U.S. 394 (1947); *MacGregor v. Westinghouse Electric & Mfg. Co.*, 329 U.S. 402 (1947), this Court has held that estoppel doctrines could not be used to shield patents from antitrust attack. Otherwise rules of estoppel,

> "... would fasten upon the public as well as the petitioner the burden of an agreement in violation of the Sherman Act. ..." (*Sola Electric Co. v. Jefferson Electric Co.*, supra, at p. 177).

Thus, "consent" as a judicial bar to recovery is contrary to the doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *D. R. Wilder Manufacturing Co. v. Corn Products Refining Company*, 236 U.S. 165, 174-175 (1915). A very purpose of the Sherman Act was to allow small traders treble damage actions when huge corporate organizations demand that he abdicate his freedom to trade in accordance with his own business judgments.

Congress was acting, in part, in response to the fact that the powerful were demanding contracts depriving parties of freedom of trade. The Sherman Act is an anti-consent statute. It clearly covers situations, as here, where a powerful corporation has assumed the right to make dealers its servants when, under law, they are free and independent businessmen who invest their personal fortunes in their businesses and who assume the risks of the enterprise.

Sun Oil Company v. Federal Trade Commission, 371 U.S. 505 (1963).

Courts of law do award damages to the plaintiff when Congress has promulgated a specific statute to give him a remedy. The wisdom of such a remedy is a concern of the Congress and not the Courts. *United States v. South-Eastern Underwriters Ass'n., et al.*, 322 U.S. 533 (1944) at 553.

3. **The doctrine of consent by definition cannot apply to any antitrust action.**

Finally, the defense of consent cannot possibly apply to the private antitrust action since it is based on coercive means or unlawful plans.

The doctrine of consent by its very definition, Restatement of Torts, Sec. 892, contemplates a person of full capacity who *freely* and without fraud or mistake manifests assent to another. The doctrine can not be applied by the common law courts to actions which show duress. See Restatement of Torts, Sec. 892, comments, pp. 489-490. But duress as it relates to property interests is not limited to fear of bodily injury, but may be applied to cases in which threats of unlawful conduct directed against the other "deprives the other of a freedom of choice". (Id. at Sec. 871, comment f., pp. 419-421).

Clearly a defense based on the consent of an independent dealer cannot be used in a Section 4, Clayton Act action. The Sherman Act is a specific legislative enactment which seeks to protect those in an inferior bargaining position. But "consent" under the com-

mon law is not to be used to deprive actions to persons entitled to statutory protection. Restatement of Torts, Sec. 892, p. 490.

Further in a common law "consent" case, the consent is an invitation for the doing of the act upon which liability is based. It operates to erase the wrong. In an antitrust case, especially in this action, the private consent or lack of consent makes no difference to the violation established by Congress. Here, those who refused to abide by respondent's demands could not obtain a lease or they lost their businesses. The dealer had no choice. The program of the defendant, in restraint of trade, thus was promulgated and maintained regardless of the invitation of the dealers. It was a scheme pushed to the consequences of, "the only paper we will write is a one-year consignment agreement." (R. 278).

It is respectfully submitted that the defense of "consent" cannot be applied to the private treble damage action for the reasons shown here. It is inapplicable to this private antitrust action because Congress has protected independent traders from coercive demands of those who control sufficient economic power to impose an appreciable restraint on free competition. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958).

There can be, it is respectfully submitted, no legal bar to Simpson's claim for damages based on Union's promulgation of a plan designed to fix uniform retail prices and enforced by the refusal to renew one-year leases the loss of his freedom to sell in accordance

with his own judgment and the loss of his business thereby.

II

UNION OIL COMPANY OF CALIFORNIA HAS VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT IN PROMULGATING AND ENFORCING A PRICE FIXING SYSTEM OF CONTRACTS ON 3,000 DEALERS IN EIGHT WESTERN STATES.

A. Petitioner Has Established Liability Under Section 1 of the Sherman Act. As a Matter of Law Upon the Stipulations and Undisputed Facts in the Record.

Questions 5 and 6 herein raise the question of respondent's violation of the antitrust laws. By reason of the stipulations of respondent and the undisputed evidence, largely in the form of policy directives by the General Sales Manager of Union, the determination of the issue of violation of the Sherman Act to the injury of petitioner may, and it is respectfully submitted, should be made in summary judgment. *White Motor Co. v. United States,* 372 U.S. 253 (1963); *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958).

1. The means used by Union to compel acceptance of a price fixing products agreement and the weapons of threat to not renew one year leases, followed by ouster of errant dealers who failed to follow price fixing orders constitute coercion and are in violation of the Richfield decision.

It is respectfully submitted that Union could not compel the acceptance of an agreement which has an inherent potential harm to the freedom of interstate commerce and which was fashioned for the stipulated purpose of fixing the prices of thousands of competi-

tive dealers, by tying the agreement to its leases, and by preventing the dealers from rejecting price orders without forfeitures of their businesses. The means used by Union are unlawful.

The tie-in of the desired lease to the gasoline products consignment agreement (Appendix C, Part II) was coercion of the dealer's independent judgment, as a matter of law. *Standard Oil* and *Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Loew's Inc. v. United States*, 371 U.S. 38 (1962). In *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953), this Court stated, at 605:

> "By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of the buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market."

It is manifest that a company may not promulgate short term leases to hold over the heads of dealers and use them as a weapon to control the freedom of dealers to trade in accordance with their own judgments (R. 429; 401-402). This was a basic issue in *Richfield*. Judge Yankwich propounded the following issue, 99 F. Supp. 280, at 290:

> "So we come to the question: Is the independence, both legal and factual, created by the lease destroyed by the oral agreements and conditions superimposed by Richfield and which binds the lessee to the distribution of Richfield petroleum products and Richfield sponsored TBA products

under penalty rigidly enforced,—as the record shows,—of ouster unceremonious on 24-hours' notice, sometimes effected between sundown and sunup of successive days?"

Findings of the fact were then entered in part as follows at 297:

"(3) The relation established by each of the three types of agreements, L-O, 337 and 3-C, is that of independent contractor, each of the operators being an independent business man, as that term is understood in antitrust law.

"(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessees of L-O stations illegal restrictions as to the types of petroleum and sponsored TBA products to be handled on the premises.

"(5) The 24-hours' termination clause is invalid, against public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reversed one month.

"(6) Richfield should be prohibited from using the 24-hours' termination clause at all to enforce its restrictive conditions as to the products sold on the premises.

"(7) The agreements in the form of leases, sales contracts and/or painting contracts, and the oral agreements superimposed on them confine the operations of the stations to which they apply to dealing exclusively with Richfield petroleum

products and automotive accessories handled or sponsored by Richfield."

Clearly the use of threats of lease ouster unless price fixing directions are followed applied to independent dealers to control their free choice of prices, (R. 93, R. 247-248), is coercion of independent dealers in violation of the act. *United States v. Richfield Oil Co.*, supra; *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Motors Corp.* (7th Cir., 1941), 121 F.2d 376, and see *Ford Motor Co. v. United States*, 335 U.S. 303 (1948).

See also *Jerrold Electronics Corp. v. United States*, 365 U.S. 567 (1961), affirming, per curiam, 187 F. Supp. 545, at 568-569.

Prices are fixed when they are coerced. Union, it is respectfully submitted, could not compel adherence to its price fixing orders by adopting the means of threatening to refuse to renew the one year leases of dealers who desired to set their own market prices. It could not compel adherence to its price orders by taking away the businesses of those who did attempt to become free re-sellers. It could not compel adherence to a tightly regimented price fixing system by ousting errant dealers from their businesses and thus making them conspicuous examples to those dealers who might seek to upset the regimented marketing system. Vertical price fixing by coercion is illegal per se. *White Motor Company v. United States*, 372 U.S. 253 (1963).

2. The retail dealer consignment agreement is in restraint of trade.

a. The purpose of respondent was to fix retail prices.

Agreements restrain trade when they are promulgated and enforced with the purpose to end competition between otherwise competitive parties or when they have that effect. Here it is admitted that the purpose of respondent's consignment agreement was to fix the prices of 3000 dealers in eight western states (Appendix C herein). But the prices fixed were the prices of businessmen who owned their own business, invested their own capital in the business and who assumed the risks of profit and loss. This is stipulated in respondent's answer (R. 91). But a purpose to fix prices of competitive merchants is an intent to accomplish a forbidden restraint. Agreements entered with the purpose of fixing prices in the competitive interstate market are in restraint of trade.

Any system of identical price fixing agreements utilized in interstate commerce entered into for the purpose of fixing the amount the public shall pay, eliminating all competition, and which requires all dealers who supply the public to abide by the price orders of a supplier is illegal per se. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 399 (1911); *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. General Electric Co.*, 272 U.S. 476 (1926); *United States v. Bausch & Lomb Optical Co.*,

321 U.S. 707 (1944); *United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150 (1940); *Ethyl Gasoline Corporation v. United States*, 309 U.S. 436 (1940); *United States v. Masonite Corporation*, 316 U.S. 265 (1942); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Parke, Davis and Company*, 362 U.S. 29 (1960); *White Motors Company v. United States*, 372 U.S. 253 (1963). See also *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).

See also opinions of the Federal Trade Commission, *Federal Trade Commission v. Atlantic Refining Co.*, Docket No. 7471, C.C.H. Trade Reg. Rep., Para. 16, 422, decided May 16, 1963, rehearing denied, Para. 16, 472, and *Federal Trade Commission v. Sun Oil Company, Docket* 6934, C.C.H. Trade Reg. Rep., Para. 16, 418, decided May 15, 1963.

b. Virtually all the risks of ownership of the gasoline are on the retail dealer consignee.

But even assuming that the per se rule does not apply when parties are attempting to bona fidely change risks of ownership for reasonable business purposes, Union's system of identical contracts cannot be saved under the rule of reason. It is manifest from the provisions of the consignment agreement that Union has not kept the risks of ownership which would allow it to justify price fixing of competitive merchants. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, supra; *United States v. General Electric Co.*, 272 U.S. 476 (1926).

The "retail dealer consignment agreements" which purported to keep title to gasoline in the hand of respondent, in reality placed the risks of ownership on the dealer. The expenses of the business were on the consignee alone (Retailer Dealer Consignment Agreement of Petitioner, R. 95, Para. 3). The consignee was liable for all taxes or liabilities imposed on employees at the station (Id., Para. 4). He was liable for workmen's compensation for his employees (Id. at Para. 4). He was liable for personal liability insurance (Id. at Para. 4). He was responsible for all expenses, costs, licenses, fees and taxes levied on the business, and upon the handling, storage, sale and delivery of gasoline (Id. at Para. 5). He was responsible for the losses of the gasoline, except as to natural catastrophies (Id. at Para. 6). He paid for the gasoline upon delivery, for the gasoline delivered to him (R. 170-171, 80; and see Para. 7). The consignee had to absorb a substantial portion of price declines (R. 285-287, 72-85). Indeed, the only obligation of respondent was the payment of the property taxes on stored gasoline.

Respondent cannot claim to have maintained a guaranteed commission policy throughout the period of petitioner's occupancy of the station but required the dealers to absorb a portion of the decrease in market prices (Id.). The record showed that the failure to guarantee commissions was based on decision of Union to make the "amount of dealer margins" more competitive with the other major retail petroleum marketers (R. 72). The sham of consign-

ment is thus shown when the respondent upon the desire to be completely competitive in dealer participation in any reductions in prices below normal retail" (R. 72), simply decided to do away with guaranteed commissions (R. 285-287, 77-78). This was expressly done to have the dealers absorb a portion of the decline in prices (Id.).

Union, of course, did not utilize judicial enforcement of its supposed consignment agreement, the right to sue for damages for sale at less than the market price, but sought to compel dealers to abide by its price orders by means outside the law under the Sherman Act. But this shows that the consignment agreement was a mere sham to fix retail prices. Thus the incidents of consignment were not recognized by Union. California Civil Code allows the factor to sell at the market price after reasonable notice for reimbursement. Civil Code of California, § 2027. Yet petitioner was ousted from the service station for attempting to sell at market prices. A factor also may as a general rule renounce the agency at any time, 35 C. J. S., Factors § 7, p. 510. Here he may do so only by losing his entire business. A factor may generally be reimbursed for necessary charges and expenses, 35 C. J. S., Factors § 43, p. 541. Here, of course, petitioner can charge nothing to respondent. He obtains no storage allowance or insurance premium refunds. Finally, the so-called "commission" is simply a retailer's margin (R. 232).

It is thus clear that respondent did not promulgate or effectuate a true consignment agreement. Agency is

not construed when the clear purpose is to control the prices of the purported agents. See Klaus, Sale Agency and Price Maintenance: II, 28 Col. L. Rev. 441, cases collected 443-450. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is fully applicable here. The retail dealer consignment agreement clearly does not justify Union's fixing prices, since it has parted with virtually all risks of ownership. The dealers are not "retail consignees" at all, but are contemplated purchasers who buy to sell again; that is retail dealers. But the agreements prevent all room for competition between the dealers who supply the public.

3. The effect of the system of identical price fixing contracts was to regiment 3,000 independent businessmen and establish fixed and non-competitive prices.

But even assuming that the system of identical price fixing contracts is saved by a bona fide purpose to consign gasoline, still the system of identical contracts must fail because its undisputed effect was to completely eliminate price competition. Respondent used the system to fix uniform and non-competitive prices on 3,000 dealers in 8 western states (R. 223-224, 231-232, 246-248, 256; 281-288; 70-86).

Under the *Masonite* case, this Court has held that restraints of trade are to be examined in terms of their effect on competition and on the freedom of interstate trade and commerce. When agency agreements are claimed as shields to mask price fixing agreements between competitors, this Court has held that judicial inquiry is to start with whether or not

the parties who receive delivery of the goods are competitors. If so, and prices are fixed between competitors, the Sherman Act proscribes the forbidden effect. But here Union is dealing with dealers who compete among themselves. Or, the dealers compete with Union (R. 382-335). Or, the dealers compete with companies who buy gasoline from Union (R. 335-336). Or, the dealers compete with six major integrated oil companies. Union Oil Company has determined that the 3,000 dealers obey its price orders to follow the prices of these major competitors (R. 346; R. 281-284, 73-76). *Masonite,* it respectfully submitted, teaches that when the effect of identical price fixing agency contracts is to regiment the prices of 3,000 independent businessmen, such a system violates the Sherman Act.

4. Union's compliance system bound the dealers to follow Union's price orders.

But even assuming that the system of identical price fixing contracts is not otherwise unlawful, any scheme or plan which compels independent business men to abide by the price directions of the supplier violates the Sherman Act. *Federal Trade Commission v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *United States v. Parke, Davis and Company,* 362 U.S. 29 (1960). This is so regardless of whether the means in themselves are unlawful.

The undisputed evidence in the record discloses that respondent utilized an oppressive price compliance system, consisting of policing prices, reporting of

errant dealers, demanding obedience to price orders, threatening non-renewal of short term leases, actual ouster of dealers. Such evidence shows the use of means to fix retail prices beyond the power of Union or any supplier who has a price fixing program (R. 247, 484-487, 489, 491-492, 509).

This Court has held that the manufacturer is entitled to the exercise of his independent discretion in refusing to deal, just as a retailer was entitled to his independent discretion in determining prices under which he sells his products. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Then a refusal to deal standing alone does not require the abdication of a dealer's freedom to sell in accordance with his free exercise of judgment. But when the manufacturer *compels* the abdication of the exercise of free judgment as to prices by devices and means which compel individual obedience to price orders on fear of losing his business it has violated the act. *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Federal Trade Commission v. Beech-Nut Packing Co.*, supra; *United States v. Parke, Davis and Company*, supra. When express agreements are used to compel obedience to price orders with the purpose of regimenting a marketing system and means are used to enforce the agreement in order to compel price obedience among thousands of competitive independent retailers an unlawful price fixing plan has been consummated. *United States v. Parke, Davis and Company*, supra. The means used here cannot be used to compel observance of prices in a price control program. The violation of

the Sherman Act occurs in the use of the compliance system, regardless of the form of agreement.

5. Union could not invite the public to lease its service stations, invest capital in them and then turn out those who desired to establish prices in accordance with their own independent judgments.

The respondent invited the small businessman to enter into business arrangements with it and invest thousands of dollars in the service station business. One year leases are offered, but the respondent boasts a general policy of continual renewal of lease with dealers who abide by the "policies and determinations" of Union Oil Company (R. 441, 450-452). The non-renewal of these leases to enforce price orders operated to drive out of the system all who exercised free judgments. "Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings". *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 467 (1941) citing *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 323.

6. Union violated Section 1 of the Sherman Act by promulgating and enforcing agreements which had the effect of substantially lessening competition and restraining trade in the purchase and sale of gasoline products at 3,000 independent market outlets.

The record further shows that the one year lease and consignment agreement plan effected exclusive

dealings in gasoline purchases of the 3,000 outlets involved. All retail dealers in California, under the retail dealer consignment agreement, except one, was selling Union Oil gasoline only (R. 336-337). The consignment agreement on its face purports to dispense gasoline through agents, and such agency avowedly establishes an exclusive relationship. But the dealer is beholden to the consignor in his purchases of gasoline by the use of the non-renewal of the one year lease. Thus the retail dealer consignment agreement program not only regiments judgments as to prices, but as to choice of gasoline.

The consignment program is thus invalid in the very area in which it is attempted to be justified. *Standard Oil and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Co.*, 343 U.S. 922 (1952) affirming per curiam, 99 F. Supp. 280.

B. There Are No Defenses to the Retail Dealer Consignment Agreement Scheme Shown Here.

1. Union's consignment agreement program failed to follow the General Electric case.

Even the claim that a single company, has a right to enter into bona fide consignment agreements with retailers cannot be used by respondent here. *United States v. General Electric Co.*, 272 U.S. 476 (1926). Union Oil of course determined to utilize illegal weapons to enforce its consignment program unlike the General Electric plan. But even assuming not, Union failed to carry the risks of title justifying its attempt

to control another businessman's prices. The risks of title were placed on the dealer by Union contrary to the very tests used by this Court in the *General Electric* decision in supporting its consignment program. General Electric there assumed all the risks of price decline. General Electric carried whatever insurance was needed and paid whatever taxes were assessed (272 U.S. 476 at 483). This is not the case with Union (R. 95-98; 284-288, 76-85).

C. Petitioner Has Established Liability Under Section 2 of the Sherman Act As a Matter of Law Based on the Undisputed Facts in the Record That Predatory Means Were Used to Control 3,000 Independent Market Outlets.

The attempt to monopolize interstate trade or commerce occurs when one with the power to do so intends to control prices or destroy competition. *United States v. Aluminum Co. of America* (2nd Cir., 1946), 148 F.2d 416, 431-432; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626 (1953).

It was the purpose of the Congress in enacting Section 2 of the Sherman Act to make certain that no plan or scheme of the size and scope shown here, utilizing the predatory weapons shown here, could escape the prohibitions of the Sherman Act. Justice White in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), at 60-61:

> "And a consideration of the text of 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded."

The dealers of major gasoline companies operating under the lease used here have been held by this Court to be independent market outlets. They are not the conduit of their suppliers. *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963); *Standard Oil and Standard Stations, Inc. v. United States*, 337 U.S. 293 (1949); *United States v. Richfield Oil Company*, supra. They are entitled to be free of monopolistic plans or schemes of powerful gasoline suppliers. These oil companies are not free to deal with lessees as independent business men, allow them to invest their personal fortunes in the business and then claim they are not a separate market for the purposes of Section 2 of the Sherman Act. In *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) this Court dealt with the plan of closely affiliated companies to control the operation of Yellow Cabs in four major United States cities and to control the purchases of these cab operators.

This Court held that an attempt to monopolize an appreciable segment of interstate cab sales was sufficient to constitute an actionable violation of Section 2 of the Sherman Act. There the cab sales involved some 5,000 licensed taxicabs in four cities. Here they are with approximately 3,000 independent outlets. The respondent here has sought to control or monopolize these outlets in spite of the fact that these dealers had invested their own funds for operation of the service stations and had gone into business for their own account, assuming the risks. The actions of the respondent allowed it to absolutely control these 3,000 independent market outlets.

The use of short term leases and the non-renewal of these leases constitute predatory weapons to control the business judgments and opportunities of these dealers.

A specific intent to control an appreciable segment of the market is shown by the evidence of predatory means being adopted to destroy the competition of dealers. This is clear evidence of an intent to monopolize. *United States v. Eastman Kodak* (D.C. N.Y., 1915), 226 Fed. 62, 77, 78; *American Tobacco Co. v. United States* (6th Cir. 1944), 147 F.2d 93 at 113:

> "The use of such methods and compulsions, brings the conduct of appellants, acting separately, within the rule announced in the Beech-Nut case with respect to restraint of trade. Moreover, the conduct of any one of the appellants, considered apart from a combination among all or any of them, is evidence of an intent to monopolize. 'The devising of means for * * * fixing sales prices, or adopting regulations for governing dealers, to be enforced by special rewards or penalties, inevitably result in concentration of business in the hands of a few, and may also result in giving to a single person or corporation such a unification of interest or management as to constitute an illegal monopoly * * * the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidence of an intention to promote a monopoly' United States v. Eastman Kodak Co., D.C. 226 F. 62, 77, 78."

The District Court below held that *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, was applicable here to bar petitioner's Section 2 action. But when a specific intent to destroy competition by unlawful means is shown the relevant market test in the *du Pont* case is not applicable. See 351 U.S. 377, footnote 23, at p. 395. Here, the competition of errant dealers was destroyed. See *Times-Picyune Pub. Co. v. United States*, 345 U.S. 594 at 611; *United States v. Aluminum Co. of America* (2nd Cir., 1945), 184 F.2d 416 at 431-432; *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959). The threats of the non-renewal of short term leases, and the final destruction of the businesses of the dealers who refused to comply with the price control program was "bold, relentless and predatory commercial behavior" manifesting a specific intent to monopolize as a matter of law. *Jerrold Electronics Corp. v. United States*, 365 U.S. 567, affirming per curiam, 187 F. Supp. 545, at 568-569. The respondent did not only refuse to rebut this evidence, it affirmatively stipulated that this was its policy (Appendix C, Part II).

The power or ability of Union to monopolize is without question. Respondent is a corporation with over a half a billion dollars in assets (R. 201) and has 11% of the service station gasoline sales in the State of California alone. The success of the program of regimented control was shown, and there existed control over the price and product judgments of an appreciable segment of the market. A single oil company of this size with control of prices as

shown here is a menace to freedom of entry into the gasoline industry.

The control of a marketing force, and the ability to control prices instantaneously even if unexercised makes Union an imminent threat to freedom of entry into the retailing of gasoline. See *Ethyl Gasoline Corporation v. United States,* 309 U.S. 436 (1940) at 458.

It would appear manifest that this was Union's ultimate goal, and that it has succeeded in attempting to monopolize an appreciable segment of the market. Its power and successful control of retail prices at 3,000 independent market outlets stands as a menace to any competitor not so equipped. As such the Courts are to nip the plan in the bud. *United States v. Aluminum Co. of America* (2nd Cir., 1945), 148 F.2d 416, at 431-432; *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

III.

EVEN ASSUMING THE RETAIL DEALER CONSIGNMENT AGREEMENT SCHEME IS NOT PER SE IN VIOLATION OF THE SHERMAN ACT, PETITIONER HAS ESTABLISHED A PRIMA FACIE CASE ENTITLING HIM TO A TRIAL ON THE MERITS.

Question 4 herein raises the right of petitioner to a jury trial. The petitioner, it is respectfully urged cannot be deprived of a trial on the merits. Clearly he has sustained a prima facie case. Even assuming that the record, construed against petitioner, is held

to be outside the per se rule, it would necessarily disclose issues of fact as to liability. *Poller v. Columbia Broadcasting System, Inc.*, supra. Clearly, also, there is a factual dispute as to any consent of the petitioner to his causes of actions here, assuming the doctrine to be available as an affirmative defense. It is urged, however, that there is no legal bar to petitioner's right to a trial by jury under Section 4 of the Clayton Act, "a Charter of Liberty, a Bill of Rights."

CONCLUSION

It is respectfully urged that the Court hold upon the record before it that the retail dealer consignment agreement program is void under Sections 1 and 2 of the Sherman Act, and that the cause be remanded solely on the issue of damages suffered. Or, in the alternative, that the judgment below be reversed and the case ordered to trial on all issues.

Dated, San Francisco, California,
September 6, 1963.

Respectfully submitted,
MAXWELL KEITH,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U.S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, as amended, 69 Stat. 282 (1955) 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U.S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the

cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 16, October 15, 1914, Chap. 323, Sec. 16, 38 Stat. 737, 15 U.S. Code, Sec. 26:

"That any person firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

Appendix B

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the

motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Appendix C

PART I

Stipulations that the purpose of the retail dealer consignment program was to fix retail prices.

At the pretrial conference of February 11, 1960, R. 414-415:

"Mr. Keith [counsel for petitioner]. But, your Honor, they are very vague on that; they do not say or they are not willing to stipulate; if they are willing they can do that right now—are they willing to say that the purpose and intention of the consignment program as it affects approximately 3,186 retail consignees was for the purpose of controlling, the purpose and intention to control and fix resale prices?

The Court. Among other things.

Mr. Keith. I don't think we have gone that far yet.

The Court. I think you have conceded that in your argument, haven't you, Mr. Lasky?"

Mr. Lasky [counsel for respondent]. There isn't any doubt, if the Court please, that by use of the consignment method we do control prices at which our gasoline is sold to the consigned stations.

The Court. And that's one of the purposes of the consignment policy, isn't it?

Mr. Lasky. Sure.

Mr. Keith. Is that the purpose?

The Court. Well, Mr. Keith, you can't——

Mr. Keith. All right. It's a purpose. All right so we have that straightened out. * * *"

At the Pretrial Conference of February 11, 1960, R. 429:

"The Court. That has been conceded, hasn't it, the first two points—the purpose of the contract among other things is to control the retail sale price?

Mr. Lasky. We have stated our position on that and I don't see any issue of fact on it.

The Court. And the consignment contract in combination with the lease was to carry out the policy of the defendant oil company insofar as maintaining a price schedule for retail distribution.

Mr. Lasky. This was one of its purposes.

The Court. Those are the first two things you had in mind, Mr. Keith, and I think they are both conceded in sufficiently definite form to eliminate those as issues."

PART II

Stipulations that the Union Oil Company would only lease property for a one-year period and conditioned the obtaining of the desired lease on the signing of the retail dealer consignment agreement. Failing to sign the consignment agreement or following Union's price directions, the dealer could not obtain a lease or a lease renewal.

At the pretrial conference of April 30, 1959, R. 379-380:

"Mr. Lasky. Now, I can put the issue of coercion, I think, in a fashion that allows your Honor to dispose of it, or pretty close to it, which is this: Counsel alleges—this is one of the questions we put in the agenda—when plaintiff al-

leges that he was compelled to accept a one-year lease and he was compelled to accept a consignment agreement, does he mean anything more than this: That if he wanted to get a lease on this property and he wanted to handle Union products and the only type of contract we would give him by which we would deal with him was a one-year lease and a consignment contract—if that is what he means when he says he was coerced into taking it, because if he didn't take that, we wouldn't deal with him, then I say those are the facts: Either he took our consignment contract and our lease or we wouldn't deal with him.

The Court. That is precisely what you mean by the word 'compel'?

Mr. Keith. This statement is correct.

The Court. And to the extent that that may be regarded as (sic) coercion, you will stipulate to that, is that right, Mr. Lasky?

Mr. Lasky. Why, yes. I don't stipulate it is coercion, but I say these are the facts.

The Court. If that constitutes coercion——

Mr. Lasky. Then we coerced him.

The Court. And you compelled him to follow this practice?

Mr. Lasky. We had a consignment contract with him and we expected him to live up to it."

At the pretrial conference of April 30, 1959, at R. 386-387:

"Mr. Keith. That your lease will not be renewed unless you agree to sign the retail dealer consignment agreement; is that the stipulation on that?

Mr. Lasky. I haven't gone quite that far.

The Court. I think you came pretty close to it.

Mr. Lasky. Pretty close to it. I said the only way we coerced the man into accepting a consignment agreement for a lease is by refusing to deal with him on any other basis. We say to him, 'This is the kind of lease we have and this is the kind of dealer supply contract we have. If you don't want this, we don't deal with you." I will stipulate to that.

The Court. That is just exactly what your position is, isn't it, Mr. Keith?

Mr. Keith. Yes, but I mean——

Mr. Lasky. If that is coercion, let the conclusion follow. We deny that it is.

Mr. Keith. You tie the two agreements together and refuse to lease if the man does not sign the retail dealer agreement, and if he doesn't abide by the retail dealer agreement, the lease is cancelled.

Mr. Lasky. No; his lease is not cancelled.

Mr. Keith. Or not renewed.

The Court. It is not renewed.

Mr. Lasky. Well, we can't cancel.

The Court. You can't cancel, but you won't renew it.

Mr. Lasky. You see, that is not in fact the truth of our situation. From a legal position——

The Court. You contend that under the law you don't have to renew it——

Mr. Lasky. That is right; that is my contention."

Pretrial Conference of Feb. 11, 1960, at R. 417-418:

"Mr. Keith. That there was no free choice; the dealer was not offered: You can either be a

purchase and sell dealer or you can be a consignment dealer. This was not offered to the dealer. He was told you have to be a consignment dealer or you will not get any lease extension.

The Court. As I understand it that isn't an issue; the defendant company has not contended that the dealer has any option at all; he either takes the package deal or he doesn't take the gasoline station.

Mr. Lasky. We have said, for the purpose of this case, we have said so."

At R. 419:

"Mr. Keith. And that it was used without free bargaining, that it was used by the instrumentality of the 1-year lease, there was no free bargaining and——

Mr. Lasky. We have said for the purposes of this case it could be taken that this is the basis upon which we give a man a lease, no other."